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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 457

CHARLES WALKER CORDOVA AND COLUMBIA PAINTING COMPANY (a corporation),
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT.

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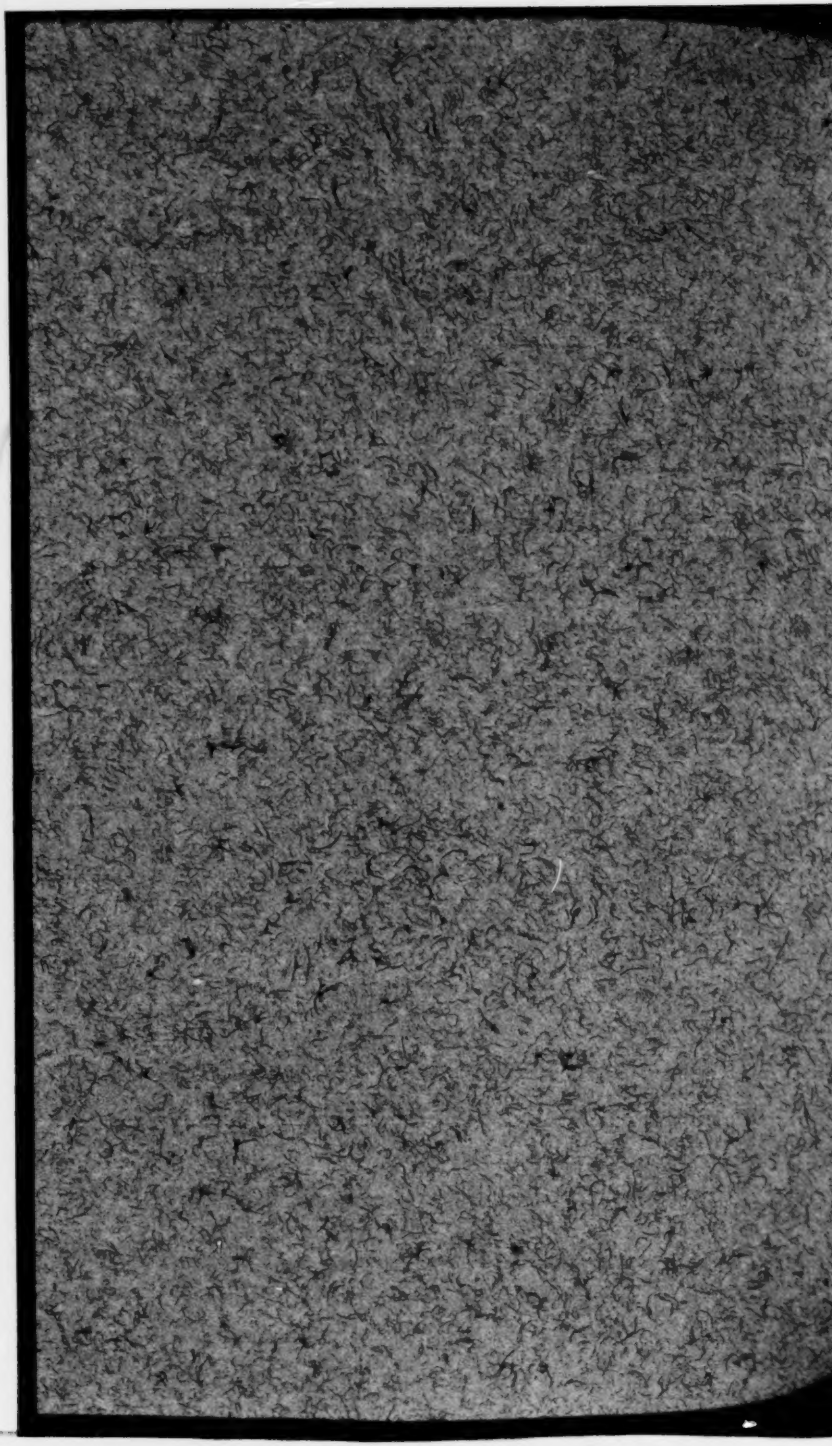

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IN THE

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OCTOBER TERM, 1949.

No.

CHESTER WALKER COLGROVE and COLUSA REMEDY COMPANY (a corporation),
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To The Honorable, The Chief Justice of The United States, and to The Associate Justices of The Supreme Court of The United States:

Chester W. Colgrove and Colusa Remedy Company, a corporation, (hereinafter styled Petitioners) respectfully petition that a writ of certiorari be issued to review the judgment of the U. S. Court of Appeals for the Ninth Circuit; which affirmed a judgment of the U. S. District Court

for the Southern District of California (Central Division) adjudging petitioners guilty of criminal contempt, for having allegedly disobeyed an injunction issued by that court in a civil proceeding under the Federal Food, Drug & Cosmetic Act.

The opinion of the Court of Appeals appears in the record (R. 88) and is officially reported (176 F. 2d 614). The judgment of the District Court also appears in the record. (R. 34, 36)

JURISDICTION.

This contempt proceeding was instituted by the filing of a criminal information in the District Court, charging a criminal contempt allegedly in violation of the federal criminal contempt statute. (28 U. S. C. Sec. 386)[1] The judgment of the Court of Appeals affirming the judgment of the District Court was entered on August 8, 1949. (R. 96) Thereafter, on September 6, 1949, and within the time allowed therefor, a Petition for Rehearing was filed, which was denied on September 19, 1949. (R. 97) On October 17, 1949, the Chief Justice granted an extension of time for filing this petition to November 18, 1949. Jurisdiction of this Honorable Court is invoked under 28 U. S. C. § 1254, Subdivision 1.

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[1] This statute, as it existed at the time of the alleged contempt herein, read in part:

> "Sec. 386. Contempts: When constituting also criminal offense. Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as provided in Sections 387-390 of this title. (Oct. 15, 1914, c. 323, Sec. 21, 38 Stat. 738.)"

THE FACTS.

Petitioners are a corporation and its president. They were convicted of criminal contempt and subjected to severe and degrading punishment (fines of $9,000.00; jail sentence of two years suspended on five years probation) in disregard of the presumption of innocence and without consideration of the principle of reasonable doubt and without any pleading or proof of willfulness. The court conceded that petitioners had followed the literal meaning of the injunction but insisted that they had violated its spirit. The court then ruled that the mere violation of the injunction as thus construed was all the proof necessary to justify a sentence of criminal intent and that evidence of willfulness was unnecessary. The circumstances were as follows:

Petitioners were selling in interstate commerce a petroleum oil for skin diseases known as Colusa Natural Oil. On the 24th of February, 1947, the United States District Court for the Southern District of California issued a preliminary injunction requiring that the labels on petitioners' product contain "*specific* directions for the use of such product in the treatment of all conditions, ills and diseases for which such product is prescribed, recommended, and suggested, in the advertising material disseminated or sponsored by or on behalf of" petitioners. (R. 2, 3)

On April 14, 1947, with the written consent of petitioners the District Court granted a permanent injunction. The significant language of the permanent injunction is identical with that of the preliminary injunction except that the word "adequate" is substituted for the word "specific". (R. 3)

The language of the permanent injunction forbids the shipment of petitioners' product in interstate commerce

> "* * * without a label containing *adequate* directions for the use of such product in the treatment of all conditions, ills and diseases for which such product is prescribed, recommended, and suggested, in the advertis-

ing material disseminated or sponsored by or on behalf of the defendants or either of them; . . ." (R. 3)

Petitioners in good faith attempted to comply with each of these injunctions. They changed the label to read as follows:

"A natural unrefined petroleum oil intended for use in the treatment of Psoriasis, Eczema, Athlete's Foot, and Leg Ulcers.

"Directions: Apply to affected parts and rub it in thoroughly morning and night. For open sores, saturate cotton pad with oil and bind on by gauze. Change to fresh dressing morning and night. For tender skin oil can be diluted 50% with olive oil. Continue treatment until skin is smooth and comfortable . . . " (R. 4)[2]

In its advertising after changing the label as above described, the petitioners in large print prescribed their product for the four diseases mentioned in the amended label. In fine print in the testimonials at the bottom of the advertisement there were suggestions that the drug was efficacious not only for the four skin diseases mentioned in the label but also for "poison ivy, poison oak, bed sores, acne, ringworm, scaley red face, burns, piles, and itch."

As the record shows without any contradictory testimony whatever, petitioners believed that the label as changed conformed to the decree. (R. 59-65) It contained directions for the use of the product which petitioners believed "adequate". The directions were to apply to the parts affected. Those directions were equally adequate for the diseases listed in large print on the advertisement and for the diseases in small print. It would not occur to anyone

---

[2] The label in the form in which it was used before the injunction was issued (R. 23, 50) was as follows:

"A Natural Unrefined Petroleum Oil"

"Directions: Apply to affected parts and rub it in thoroughly morning and night. For open sores saturate cotton pad with oil and bind on by gauze. Change to fresh dressing morning and night. For tender skin oil can be diluted 50% with olive oil."

of common sense to do anything else with the oil for the diseases mentioned in fine print than to rub them on the affected parts.

Nevertheless, on October 2, 1947, a criminal information was filed against petitioners charging criminal contempt of the injunction. The information was in nine counts. (R. 2-15) The counts related to different shipments of the product in interstate commerce but were all based on the same contention. The information charges (R. 4):

> "Said advertisements prescribe, recommend, and suggest Colusa Natural Oil as highly efficacious not only for psoriasis, athlete's foot, eczema, and leg ulcers (the four disease conditions mentioned on the label of said drug) *but also* for poison ivy, poison oak, bed sores, acne, ringworm, scaley red face, burns, piles, and itch." [Emphasis in original]

It continues that the labels on petitioners' product, as shipped:

> ". . . disregarded the requirements of the aforesaid preliminary injunction since they fail even to attempt to *bear specific directions for use of the product in the treatment of all ills, conditions, and diseases for which the product is prescribed, recommended and suggested in the advertising* material disseminated and sponsored by the defendants.
>
> "That by reason of the said shipment . . . the defendants are in criminal contempt of the preliminary injunction issued by this Court as aforesaid." (R. 5)

This is the entire extent of the allegation of the information. *No charge was made anywhere in the information that the alleged contempt was willful,* although the statute under which the information was brought, 28 U. S. C. § 386, applies only to "Any person who shall wilfully disobey . . ." a lawful court order.

A trial was had before a judge without a jury. The Government's entire case consisted of a stipulation that the

shipments in interstate commerce had been made and that the labels and the newspaper advertising were in the forms attached. The Government then rested (R. 27, 46-49, 56). The only other testimony in the case was that of petitioner Colgrove (R. 56-65) who testified that he understood the injunction as requiring that the labelling include only the names of the four diseases featured in large type in his advertisement and that he went to great expense and trouble to alter his labels to meet the injunction as he in good faith understood it. (R. 63) He also testified that the conditions mentioned in small type in the advertisement were merely alternative names for or special cases of the ailments mentioned in large type in the advertisements and included on the label. (R. 62, 63). Cross-Examination was brief (R. 64, 65) and involved merely reaffirmation by Colgrove of his good faith. This was the entire record.

In argument the Government conceded that the label did contain adequate directions for use in connection with the four ailments specified by name on the label affixed to the bottles. It claimed, however, that the shipments involved a contempt of the injunction because the labels on the bottles failed to mention the names of the several other ailments which were mentioned in small type in the body of the form of advertisement employed by the petitioner. It was conceded by the Government that had the names of these additional ailments been included on the bottle, the injunction would have been complied with, even on its construction.

A copy of the advertisement which is the sole foundation of this criminal proceeding is attached as Exhibit A. We have marked those portions of this advertisement on which the Government predicates its case. It is conceded by the Government that but for these portions thus marked, (which incidentally mention certain minor skin ailments not featured in block print nor named on the label) the label would be beyond criticism in this suit. (R. 50, 51, 71, 74)

The advertisements in question were published in various newspapers of general circulation (R. 18, 29, 31, 32, 33). The advertisements were inserted by the petitioner corporation. It is not contended by the Government that these advertisements are labelling or that they can be regarded as accompanying the product in any way. (R. 53)

At the conclusion of the trial the court found the petitioners guilty and imposed on the individual petitioner six months jail sentence on each of four of the counts, such sentences to run consecutively and fines of $1,000.00 each on the other four counts. The sentence to the jail term was suspended for a period of five years on probation. (R. 36-38) The corporate petitioner was fined $5,000.00 (R. 34, 35)

In neither the judgment against the individual nor the corporate petitioner did the court find a willful violation of the injunction. It merely held:

> "It Is Adjudged that the defendant has been convicted . . . of the offenses of . . . having shipped in interstate commerce a product which failed to bear specific directions . . . etc.,"

and

> "It Is Adjudged that the defendant is guilty as charged and convicted." (R. 34, 35, 36, 37)

The deficiency in the finding cannot be supplied from the information since that likewise made no charge of willful violation of the injunction. (R. 2-14) The court conceded that the injunction was ambiguous and that the petitioners had not violated its literal terms, in the following language: (R. 77)

> "The defendant is technically, literally correct in the literal reading of the restraining order, that the label be required to contain specific directions for the use of the product—I am abbreviating that—in the treatment of all ills for which such product is prescribed, recommended, and suggested.

"Read literally, the prohibition is against introducing into interstate commerce drugs which do not contain a label containing specific directions for its use in connection with all ills for which it is prescribed and recommended and suggested in the advertising material disseminated by the defendant.

"So, literally read, it is true that in order to violate the language of this injunction it would be necessary for the advertising material to prescribe and recommend and suggest the use of the product for the treatment of a condition or an ill or a disease not referred to in the label. That, manifestly, is not the spirit of the injunction.

"I think the injunction should, possibly, have been worded in the disjunctive instead of the conjunctive. It should have read 'conditions, ills, and diseases for which such product is prescribed or recommended or suggested in the advertising material,' but the manifest spirit must be to read it in the disjunctive, because if the advertising material is prescribed, certainly prescription includes 'recommendation and the suggestion' and there would be no meaning at all left for the words 'recommended and suggested' if the words were used alternatively. As I stated, 'prescribed' includes 'recommended and suggested.'

"My view of it is that the defendant attempted to obey the words but not the spirit of the prohibition."

In resolving the question of the necessary criminal intent required to impose a jail sentence for violating "the spirit of the injunction" the court in a colloquy with counsel held as follows (R. 74):

"Mr. McGann (counsel for petitioner) . . . Mr. Colgrove had no intent of violating this injunction at any time . . . There must be criminal intent.

"The Court: He has to intend to do what he did, doesn't he?

"Mr. McGann: What is it?

"The Court: The intent—

"Mr. McGann: Is not to violate the injunction.

"The Court: —is the intention to do what he did."

Thus the court held that if the defendant violated the injunction mistakenly believing that he was within its terms, nevertheless, since he intended to do what he did, he was guilty of criminal contempt. This ruling deprived petitioners of the presumption of innocence which is the right of every person charged with criminal contempt. It also deprived petitioners of the benefit of the rule that in a conviction for criminal contempt all elements of the offense, which include willful violation, must be proved beyond a reasonable doubt.

THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS.

The Court of Appeals below affirmed the conviction for criminal contempt (R. 88-97). The opinion did not explicitly discuss the lack of evidence of willful violation, but it did infer bad faith on the part of petitioners because of two other cases involving the same product which the court said were "of significance". *No mention of either case appeared in the record of this proceeding.* One was a case where another corporation and the same individual defendant were convicted of misbranding Colusa Oil and the conviction was reversed. (*Empire Oil and Gas Corp., et al.* v. *United States,* 136 F. (2d) 828 (C.C.A. 9, 1943). The court stated in a footnote (R. 89) that after his conviction had been reversed Colgrove, the individual petitioner, had plead *nolo contendere.* None of the circumstances or the reason for this plea appear. It is, however, a plea not ordinarily permitted in the case of a willful and intentional offense.

The other case is a libel action brought in the Northern District of Iowa seizing the petitioners' product. (*United States* v. *9 Bottles Colusa Natural Oil,* 78 F. Supp. 721). The Court of Appeals below paraphrased a finding in the Iowa Case, saying that petitioners' products "are of no value in the treatment of skin infections; and that their use in some circumstances may even be harmful." In other words, if the Iowa Case is correct petitioner was advertis-

ing a product without curative value and would have committed an offense even if they had followed the injunction as construed by the court below.

The Iowa decision was pending on appeal at the time the court below used it as evidence of bad faith. The findings were affirmed but the order is not yet final since a petition for certiorari has been filed.

We think it plain error for the court to use against petitioners these collateral cases which are not in the record and the circumstances of which petitioners had thus no opportunity to explain. However, since the court did use them we think it is permissible to point out that they show an inconsistent attitude on the part of the Food and Drug Administration toward the defendant which we believe amounts to a tyrannical abuse of the contempt power.

Petitioners at the time of the contempt proceedings found themselves in this situation. According to the District Court of Iowa they could not advertise their product at all. According to the District Court of California they could advertise their product provided they gave adequate directions for use. In this situation petitioners did not go out of business because, rightly or wrongfully, they felt they could reverse the Iowa case on appeal, and therefore the dissolution of their business was not yet necessary. The form of the injunction obtained by the Food and Drug Administration must have given them some hope. They therefore, as the record shows, attempted to comply with the California injunction by giving directions for use which were adequate as a practical matter and were a literal compliance with the injunction.

If certiorari is denied in the Iowa case petitioners will be completely out of business. It is certainly unjust and tyrannical to compel them at the same time to suffer five years of probation in addition to the loss of their business because they did not advertise in a way which the Iowa court had held to be illegal. In other words, the Iowa injunction had the effect of an invitation which entrapped

petitioners into doing what the Food and Drug Administration and the Iowa court had held was a criminal act.

We suggest the inconsistency of these two decisions not as a matter of technical conflict but only to show that what the court was really punishing the defendants for was advertising the oil as a cure for anything. Certainly by no stretch of the imagination can that be called evidence of bad faith against the positive testimony of a defendant who was attempting to stay in business while his rights were being determined. Certainly there is no basis here in justice for both a jail sentence under the California proceedings and in addition the destruction of his business by the Iowa decision.

Finally, we point out that the offense in this case is not the label but the advertisement. Had the petitioners continued to sell the product labelled as a cure for the four diseases in the block print without mentioning the additional diseases suggested in the fine print in testimonials the Government concedes that he would have complied with the injunction. It was not, therefore, the label which was the offense under the Food and Drug Act. It was the fact that the defendant advertised as he did. There was no offense until the advertisement was published. Thus we think that the Food and Drug Administration in this case is attempting to control advertising which is beyond its jurisdiction.

QUESTIONS PRESENTED.

1. Whether in a criminal contempt proceeding for violation of an injunction obtained under the Food and Drug Act the presumption of innocence obtains and proof of guilt must be beyond a reasonable doubt.

2. When an injunction is admitted by the trial court to be ambiguous and where sole evidence on the issue of willful violation is the defendant's testimony that he was in good faith attempting to comply, may the court convict

and impose a heavy penalty on the ground that no further proof of willfulness is required because the defendant intended to do what he actually did.

3. Where a defendant in a criminal proceeding for violation of an injunction is conceded by the court to have obeyed the literal meaning of the restraining order, may the court nevertheless punish him for criminal contempt because he (in the language of the court) "attempted to obey the words but not the spirit of the prohibition".

4. May a defendant be convicted of criminal contempt because of a misunderstanding of an injunction, which is neither explicit nor precise in its commands and which is capable of different interpretations.

5. Where a label is conceded to be not a violation of an injunction if no advertising is published, may the Food and Drug Administration punish the defendant for advertising which is general and does not accompany the products in any way.

REASONS FOR GRANTING THE WRIT.

I.

The Issue Presented by the First Four Questions.

The issue presented by the first four questions is an issue of importance which has not been but should be decided by this Court. It also involves a direct conflict with the applicable decisions of this Court. It relates to the power of the Court to punish for criminal contempt in the absence of a showing of willful disobedience of an injunction. We assert that this conviction for criminal contempt in the absence of any showing of willfulness violates the rule announced by this Court as to presumption of innocence and as to the burden of proof on the Government to produce evidence which establishes guilt beyond a reasonable doubt.

The conviction of contempt in this case involves a construction of the criminal contempt statute which is directly

in conflict with the decisions of this Court and of other Circuits. This Court has held that

> "In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself."
>
> (*Michaelson* v. *U. S.*, 266 U. S. 42, 66, *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 444.)

In spite of these decisions the court below regarded the criminal contempt statute as requiring only the finding that the defendant intended to do what he did,—a finding relevant only in a case of civil contempt.

Neither the information nor the judgments against the petitioners contain either a charge or finding of willfulness in the alleged violation of the injunction. Nor does any of the colloquy by the court state that the violation of the injunction found was a willful one other than a brief statement that "the intent is . . . to do what he did." (R. 74 quoted *supra*.) The judgment, for example, reads:

> "It is adjudged that the defendant has been convicted . . . of the offenses of . . . having shipped in interstate commerce, etc.; and in disregard of the injunctions issued . . . " (R. 34)[3]

The contempt statute specifically provides that it is applicable only to a person who "shall willfully disobey" a court order. 28 U.S.C. § 386.

This Court and the lower courts have construed this statute as requiring a deliberate and intentional flouting of the courts process. Thus in *Wilson* v. *North Carolina*, 169 U. S. 586, this Court said:

> "We see no evidence of any *intentional* contempt on the part of relator, and our conclusion is that the rule must be discharged." (Emphasis supplied)

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[3] The appellate court likewise made no finding of willfulness although on the basis of matters not in the record, as we shall see below, it made some statements which indicated that it believed that the violation was not innocent.

In *United States ex rel. Porter* v. *Kroger Grocery & Baking Co.*, 163 F. 2d 168 (CCA 7, 1947), the Court for that circuit held that it is necessary to show intentional violation of a court decree. The court cited with approval (163 F. 2d at 173) from *In re Rice*, (C.C., M.D. Ala., 1910) 181 F. 217, 228, as follows:

> "No one can be punished for a criminal contempt unless the evidence makes it clear that he intended to commit it. To [the] doubt is to be resolved in favor of respondent."

The decision of the court below is in marked opposition to these rulings. We believe the facts show that it reads the word "willful" out of the statute. The facts are that the record presented by the government was a simple stipulation (1) that an injunction had been issued in a certain form, (2) that certain shipments had been made, (3) that the shipments contained labels in a certain form, and (4) that certain newspaper advertising had been used. (R. 24) The government then rested. (R. 27, 49, 56) At most this stipulation could do no more than establish a violation of the injunction.[4] The entire record is in substance in this petition in the advertisement and the label. It was on this record that the court below found a violation. The only other testimony in the entire record was that of petitioner Colgrove. He testified that he understood the injunction required inclusion on the label only of the names of conditions which he advertised in large type and that it was only these conditions for which he believed a remedy was "prescribed, recommended and suggested" in the advertisement. (R. 62, 63) The court conceded that this was so if the letter of the injunction was to be considered but stated that its spirit was otherwise and petitioner had violated the spirit of the injunction. (See R. 78. "My view of

[4] In fact it could not even do this. See the testimony of petitioner Colgrove that the conditions mentioned in the advertising and not on the label were merely different names for or special kinds of the ailments specified on the label (R. 62, 63). No contrary evidence was offered by the government.

it is that the defendant attempted to obey the words but not the spirit of the prohibition.")

While this might perhaps have been a permissibly broad construction of an injunction for the granting of civil relief by way of civil contempt (which we do not concede), it provided no basis whatever for a conviction of "willful" contempt as required by the criminal contempt statute. Indeed, petitioner's testimony not only protested his attempt to comply with the injunction but gave specific details concerning recalling said product for relabelling. (R. 63) It was also clear that the government was contending only that the inclusion of the names of certain other conditions on the label was required. Had those names been included, the government made it clear that the directions for use under its construction would have been adequate. (R. 50, 51, 74) Of course, the use for all skin conditions was the same, i.e., the Colusa oil was to be applied to the skin eruption by rubbing it in morning and night. Thus, it was plain that the inclusion of the names of the ailments mentioned in small type in the body of the advertisement would have been a simple matter had petitioner so understood the injunction. No evidence appears in the record that any gain could be obtained by them from failing to include these names, nor any evidence of bad faith.

Accordingly, it was on a bald stipulation of the commission of certain acts that the court held petitioners guilty of criminal contempt. It is submitted that if the court's finding is a finding of willful contempt, it is based on a construction of the criminal contempt statute opposed to that of this Court and the other courts mentioned above.

The appellate court's opinion considered the question of whether the injunction required the inclusion on the label the names of the additional diseases. It found that they were required. It has no specific discussion of willfulness, but it appears to have given the matter some consideration.

On this point, it referred only to matters outside the record. It cited petitioner's "court experience in this re-

spect" which it stated "is of significance". (R. 89) It then cited a district court case by its Federal Reporter citation (78 F. Supp. 721) which it said found that the oil in question was "of no value in the treatment of skin affections; and that their use in some circumstances may even be harmful."[5] It also referred to "numerous actions" by the government including a conviction which had been set aside by the very Ninth Circuit in question. *None of this material was in the record before the District Court.* It was not introduced by the government and petitioners of course had no opportunity to know that the court was considering such matter or to rebut the inferences by additional evidence or explanation. The appellate court is thus absolutely without foundation in the record for its statement that "Colgrove was quick to seize upon the discrepancy, and he steered his course so as to sail as closely into the wind as he thought he safely could." (R. 93)

The procedure of the Court in thus going outside the record to attempt to supply a showing of willfulness for which the record contained no support is in direct contravention of the rulings of this Court. See *Congress & Empire Spring Co.* v. *Knowlton*, 103 U. S. 49, 61, where the Court specifically refused to consider even identical litigation between the parties in another court and specifically stated "We cannot consider facts not brought to our notice by the record." (at 61)[6]

The procedure of the courts below—first of the district court in imposing a severe sentence for willful criminal

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[5] The ruling in that case was of course not final and a petition for certiorari is being filed in that matter concurrently with the present case.

[6] The entire passage from the opinion is as follows:

> "It is suggested by counsel for plaintiff in error, that the Court of Appeals of the State of New York has in this identical suit, upon the same state of facts, adjudicated the rights of the parties, and this court ought to consider the questions raised in this case as *res judicata*.
>
> "The reply to this suggestion is, that it nowhere appears in the record that this case was ever before the Court of Appeals, or that it was ever decided by any court except the United States Circuit Court for the Northern District of New York, from which the case has been brought to this court on error. We cannot consider facts not brought to our notice by the record."

contempt on a record devoid of evidence of willfulness and then of the appellate court in attempting to bolster a weak record by affirming on the basis of facts not in the record—fly in the face of settled decisions of this court. The power of the courts to punish for criminal contempt as so extended present a real danger of tyrannical infringement of the rights of citizens. The questions presented by the conduct of this litigation are of obvious importance. Review should be granted so that basic principles laid down by this Court in the past may be reaffirmed beyond possibility of misconstruction.

II.

The Issue Presented by the Fifth Question.

The issue presented by the fifth question is of importance in the construction of the Federal Food and Drug Act with respect to the control of the Food and Drug Administration over advertising in newspapers of general circulation as distinguished from pamphlets and other literature accompanying the product. Here we have a label which is concededly legitimate (so far as the California case is concerned) so long as no advertising of additional diseases is published. Upon publication of advertising the offense is committed. This we assert is control of advertising, not control of labels. The Federal Trade Commission has jurisdiction on the question whether advertising constitutes an offense.

The criminal contempt statute is violated only if the action held to be a contempt is "of such character as to constitute also a criminal offense". 28 U.S.C. § 386. Thus, to sustain its finding of contempt the courts below were required to find not only that the injunction had been violated but that the acts of petitioners constituted also a criminal offense. Petitioners in urging that they are not guilty of a criminal offense are thus not, as the court below stated, merely attacking the injunction collaterally (R. 92) but are

rather denying the existence of an independent statutory prerequisite to a conviction for criminal contempt.

The Court of Appeals for the Ninth Circuit apparently found the criminal offense to be a violation of 21 U.S.C. § 352(f)(1). That section provides that a drug is misbranded if it does not contain "adequate directions for use." (R. 90) That section as construed by the court below and by the Federal Security Administrator (Section 1.106(a), Title 21, Code of Federal Regulations, 1949 Edition) requires that in order for labelling to bear adequate directions for use it must include directions for use specifically naming each condition for which the drug "is prescribed, recommended or suggested . . . " not only in its labelling but also "in its advertising disseminated or sponsored by or on behalf of its manufacturer or packer . . . "

At the last term of court in the cases of *Kordel* v. *U. S.*, — U. S. —, 69 S. Ct. 106, and *United States* v. *Urbuteit*, — U. S. —, 69 S. Ct. 112, this Court held that the Federal Food, Drug and Cosmetic Act gave power to the Food and Drug Administration to control literature advertising a product provided that literature was in the nature of labelling and accompanied the product. It specifically refused to pass on the power of the Food and Drug Administration over advertising not constituting labelling. It found it unnecessary in those cases to mark out further the line of jurisdiction between the Food and Drug Administration and the Federal Trade Commission over advertising, holding that the fact that the advertising involved in those cases was in the nature of labelling excluded it from the jurisdiction of the Federal Trade Commission. (See 69 S. Ct. at 110)

In the present case it is not contended by the Government that the advertising in question is labelling (R. 53). The advertising is advertising in newspapers of general circulation. It is clearly advertising other than labelling within the jurisdiction of the Federal Trade Commission under 15 U.S.C. § 52(a) and 55(a), and that agency would have had authority to proceed if it believed the advertising false.

The Food and Drug Administration, however, has made a claim, sustained by the court below, that the authority given it to require "adequate directions for use" in labelling gives it power to review newspaper advertising and to compel a statement in the label of all conditions mentioned in newspaper advertising. Thus in the present case the labelling would be conceded to be adequate if the advertizing had not mentioned other conditions. It was the advertising, not the label, which made the offense. We believe that this is an encroachment upon the jurisdiction reserved under the Federal Trade Commission and which Congress specifically refused to transfer to the Food and Drug Administration.

The Food and Drug Administration has asserted a power to control newspaper advertising which is not labelling by use of its power over labelling. It has asserted this power not only in the present case but by a general interpretative regulation as sustained by the court below. It is submitted that the line of demarcation created by Congress between the Food and Drug Administration and the Federal Trade Commission in two separate and carefully distinguished acts both relating to interstate commerce in drugs has not been and should be determined definitely by this Court.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No.

CHESTER WALKER COLGROVE and COLUSA REMEDY COMPANY (a corporation),
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. PROOF BELOW WAS INSUFFICIENT.

(A) The Law.

This Honorable Court has, on various occasions, emphasized that:

> "In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself."
>
> (*Michaelson* v. *U. S.*, 266 U. S. 42, 66; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418).

> "In a proceeding for criminal contempt . . . The burden is on the government to prove the guilt of the defendants beyond a reasonable doubt. There is no shifting of the burden of proof." (*U. S.* v. *Balaban*, 26 F. Supp. 491, 498, 499).

Therefore, it was incumbent upon the government to prove herein, beyond a reasonable doubt, every element and fact necessary to show a criminal contempt. Among other things, this required proper proof of a "*willful*" disobedience of this injunction. This Honorable Court has heretofore clearly defined, in *Screws* v. *United States*, 325 U. S. 91, at 101, the significance of the word "willful" in such a criminal statute:

> "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' * * * But 'when used in a criminal statute it generally means *an act done with a bad purpose*. . . .' [citing cases] *In that event something more is required than the doing of the act proscribed* by the statute. Cf. *United States* v. *Balint*, 258 U. S. 250, 66 L. Ed. 604, 42 S. Ct. 301. *An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime.* [citing cases] . . ." [Emphasis supplied]

(B) Application of These Settled Principles to the Facts Herein.

(1) No proof of inadequacy of directions for use.

The gist of the injunction herein is its requirement that the Colusa label contain "adequate directions" for the use of this product in the treatment of the diseases for which the oil:

> "is prescribed, recommended, and suggested, *in the advertising material . . . of defendants.*" (R. 3).

The Information below shows on its face (R. 4) that:

(1) *All the shipments of Colusa Oil complained of bore labels,*

and

(2) *All these labels contained "directions for use of this product."*

It would seem elementary, under this state of facts, that in order to establish a criminal contempt, the government was required properly to allege and prove that:

(1) Petitioners, in their advertising matter, *prescribed* Colusa Oil for certain diseases or ills,

and

(2) That the "directions for use" on the Colusa labels were *not* adequate for the use of this product in the treatment of the diseases for which it was thus *prescribed,*

and

(3) That defendants *knew* these "directions for use" to be inadequate.

The government completely failed to prove these essentials, or any thereof.

While the very core of this injunction is the requirement of "adequate directions" for use, the government did not even *try* to prove that the "directions for use" on the Colusa labels were *not* adequate. There is a complete absence of any such proof.

To the contrary, the government in effect conceded below that these directions for use were adequate. It at least impliedly conceded that they were adequate for the *four diseases named on the Colusa label* (psoriasis, athletes foot, eczema and leg ulcers). *No question was raised as to the*

propriety or adequacy of the label insofar as these diseases are concerned. These four diseases are generally recognized as the severest and most difficult and baffling of the skin diseases. The other minor ailments incidentally mentioned in the Colusa advertisement are far less severe. In fact, to a large degree they are but physical manifestations of the same generic ailments. There was direct evidence to this effect (R. 62, 63) and there was no proof at all that they were different conditions or ailments. For example, "itch" is common to all the aforementioned severe skin afflictions (R. 62), and poison oak and poison ivy are among the eczemas (R. 62). It would seem quite evident that "directions for use" which are adequate for the use of this oil in the treatment of psoriasis and eczema would be entirely adequate in the treatment of these minor ailments which are to a large degree but minor manifestations of the aforementioned serious diseases. Particularly is this so when it is realized that this oil is applied in *exactly the same way* in the treatment of all these skin ailments. It is directly applied to the skin in the same manner as the host of other oils, ointments, petroleum jellies and similar preparations sold by American drug stores for skin treatments.

In fact, there is a serious question as to whether, under the Food & Drug regulations, any "directions for use" were required for this Colusa oil. Not every drug requires a label containing "adequate directions" for use. The Food & Drug regulations (21 C. F. R. (1949 ed.) § 1.106(g)) expressly state that a drug is exempt from these requirements (of clause (1) of Section 502(f) of the Act) when it is of such a nature that:

> "with respect to common uses, adequate directions for which are known by the ordinary individual."

Certainly, the application of an oil (or ointment, jelly, etc.) to the skin is such a common and simple affair that it would seem that no specific or other directions for use would be required.

The government's counsel in effect conceded below the adequacy of these "directions for use" because he conceded that the Colusa label would have been beyond criticism if the names of the "omitted" diseases (poison oak, poison ivy, itch, etc.) had been added to the Colusa label:

> "The Court. . . . Is it the Government's contention that this advertisement becomes in effect a part of the label?
>
> "Mr. Klinger. Not necessarily a part of the label, your Honor, no; but it is in conflict with the court's order heretofore entered, which is, pursuant to the statute, that the defendants are not in their advertising, after those injunctions, to recommend, suggest or prescribe this product for any conditions, . . . *other than those named on the label.*" (Emphasis ours). (R. 53).
>
> * * *
>
> "The Court. The entire complaint here is that they were not included." (R. 74) (i.e. on the label).
>
> * * *
>
> "The Court. Does the Government agree that this (i.e. the new label) now complies?
>
> "Mr. Klinger. No. Of course, your Honor, the first eight counts are based on that label and say that that label does not comply with the order because the advertising which is disseminated in connection with this product bearing this label recommends, suggests and prescribes that product for those other nine conditions referred to in the information" (R. 50, 51).

In other words, had these "omitted" diseases been added to the label, it would have been all right. This necessarily means that the "directions for use" on that label were adequate for these "omitted" diseases.

(2) No proof of any intentional disobedience of this vague writ.

Not only was there no proof of *any* disobedience of this injunction or of any *intentional* violation thereof, but, to

the contrary, the undisputed evidence below *shows a conscientious effort by petitioners to comply.* This evidence (R. 63) shows that immediately after the issuance of the preliminary injunction by the District Court, petitioners, in a diligent effort to comply with this order:

> (1) Suspended *all* shipments, *intrastate* as well as *interstate* (even though the court decree did not apply to *intrastate* shipments).
>
> (2) Destroyed their supplies of old labels and printed new labels at substantial expense.
>
> (3) Recalled, at substantial expense, previous shipments of Colusa Oil from various states, for relabeling (even though defendants could have proceeded freely to sell and distribute these pre-injunction shipments to such states, with impunity insofar as this injunction was concerned).

This evidence stands wholly undisputed.

Furthermore, the defendants expressly disclaimed, in the sworn testimony below, any intent to violate this injunction. Mr. Colgrove testified:

> "Q. There was no intent on your part at any time to violate this injunction?
> A. Positively not.
> Q. You did everything you felt that was in your power towards conforming with it?
> A. I did." (R. 63).

(3) Petitioners did not prescribe Colusa Oil for poison oak, poison ivy, etc.

As shown above, an indispensable link in the government's chain of proof is a showing that petitioners "prescribed, recommended and suggested" this oil for these "omitted" diseases (poison oak, etc.).

The government and the lower courts took the position that the aforementioned incidental mention (in the Colusa

advertisement), of poison oak, etc., constituted a "prescribing" of this product for said diseases.

We respectfully submit that under any fair or proper interpretation this incidental mention of these diseases did not constitute a "prescribing" therefor. "Prescribing" (according to Webster) means "to direct, designate or order for the use of, as a remedy." Furthermore, the testimony of petitioner Colgrove makes it very clear that petitioners did not intend to, or think they were, by such reference, "prescribing" this product for said diseases:

> "A. I did not prescribe for any of the material in the rest of the advertisement. That is one of your allegations.
>
> Q. You say you were not 'prescribing.' Were you 'recommending and suggesting' only? Is that the point?
>
> A. I was not 'prescribing, recommending and suggesting.' I was conforming with the decree, in my opinion, according to my literal interpretation of it." (R. 64-65).

II. NO SUFFICIENT PLEADING OF A CRIMINAL CONTEMPT.

(A) The Law.

It is a cardinal principle of criminal pleading that the indictment or information must allege the facts of the alleged offense *with precision and certainty,* and that vague and indefinite allegations will not suffice. The following text statement epitomizes the many judicial expressions of the aforementioned legal principle, viz:

> "Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilt must be stated in the indictment . . . The offense and the essential elements thereof must be alleged in positive terms, and not by way of recital or mere legal conclusions, unaided by intendment or inference." (27 *American Jurisprudence,* p. 621, Sec. 54).

The following are a few of the many cases exemplifying this settled legal principle, viz:

U. S. v. *Hess,* 124 U. S. 483;
White v. *U. S.* (CCA 10, 1933) 67 F. (2d) 71;
Jarl v. *U. S.* (CCA 8, 1927) 19 F. (2d) 891;
Clary v. *Commonwealth,* 163 Ky. 48, 173 S.W. 171;
Merwin v. *People,* 26 Mich. 298, 12 Am. Rep. 314;
Collins v. *U. S.* (CCA 9, 1918) 253 Fed. 609;
U. S. v. *Morse,* 287 F. 906 (D. C. D. Conn., 1923);
Harris v. *U. S.* (CCA 8, 1939) 104 F. (2d) 41;
See Rule 42(b), Rules of Criminal Procedure.

In most of these cases, the upper court reversed a conviction, after trial below, because of the insufficiency of the indictment or information.

It has been held in a number of cases that the failure adequately to allege the facts constituting a crime is tantamount to a denial of due process of law:

Fontana v. *United States* (CCA 8, 1919) 262 F. 283;
United States v. *Safeway Stores* (D. C. Kan., 1943) 51 F. Supp. 448;
United States v. *Johnson* (D. C. Del., 1943) 53 F. Supp. 167;
United States v. *Ferranti* (D. C. N. J., 1944) 59 F. Supp. 1003;
McLaughlin v. *State of Indiana* (1873) 45 Ind. 338.

(B) Application of These Principles to the Information Herein.

The information below completely fails to comply with this basic rule of criminal law. It fails to allege, either generally or specifically, facts to show:

(1) That the "directions for use" are inadequate.

(2) That petitioners *knew* this to be so or otherwise *willfully* violated this injunction.

(3) That petitioners "prescribed" this oil for the diseases incidentally mentioned in fine print.

The following is the effort of the government to allege a criminal contempt:

> "That the labels on defendants' product, as shipped to said Schlintz Bros. Drug on July 9, 1947, disregard the requirements of the permanent injunction described in Count I since they fail even to attempt to bear adequate directions for use of the product in the treatment of all ills, conditions and diseases for which the product is prescribed, recommended and suggested in the advertising material disseminated and sponsored by the defendants." (R. 6).

This allegation in Count Three is typical of the language employed in the other counts.

It is clear, we respectfully submit, that these allegations do not comply with the settled legal requirements of such a pleading. Not only is this entire allegation simply a general legal conclusion of the pleader, but it does not either directly or otherwise allege the inadequacy of the directions for use or facts to show wherein they are inadequate, nor does it contain any averment that petitioners *knowingly* or *willfully* violated this injunction.

III. THE INJUNCTION BELOW WAS SO VAGUE AND INDEFINITE AS NOT TO CONSTITUTE AN ADEQUATE BASIS FOR THIS CONTEMPT PROCEEDING.

To serve as the basis for a contempt proceeding an injunction or other order must be clear and specific, and the party bound by it must be able to determine from its terms what he may and may not do. An excellent statement of the law on this point is:

> "To hold a person guilty of contempt for violating an injunction, the acts constituting the contempt must be clearly and specifically prohibited by the terms of the injunction. *Mattos* v. *Superior Court*, supra, 30 Cal. App. (2d) at page 649, 86 P. (2d) 1056, and cases there cited; *American Foundry & Mfg. Co.* v. *Josam*

Mfg. Co., 8 Cir., 79 F. (2d) 116, 118; *City of Campbell* v. *Arkansas-Missouri Power Co.*, 8 Cir., 65 F. (2d) 425, 427, 428. The party bound by an injunction must be able to determine from its terms what he may and may not do; he cannot be held guilty of contempt for violating an injunction that is uncertain or ambiguous (Ibid.), just as he may not be held guilty of violating a criminal statute that fails to give him adequate notice of the prohibited acts." (*Brunton* v. *Superior Court* (Cal. 1942), 20 Cal. (2d) 202, at 205, 124 P. (2d) 831).

We respectfully submit that the injunction below is utterly indefinite and vague.

IV. CONTEMPT PROCEEDINGS NOT JUSTIFIABLE IN THIS CASE.

We have endeavored to demonstrate hereinbefore that there was neither adequate pleading nor proof of a criminal contempt herein. We believe it is very clear that no contempt existed or was established. We believe the record clearly shows the contrary.

However, the very least which can be said in favor of petitioners is that it is extremely doubtful whether petitioners willfully or otherwise violated this vague injunction. Under these circumstances, these contempt proceedings are not justifiable.

This Honorable Court has spoken on this subject as follows:

> "Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct." (*California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618).

To the same effect:

City of Campbell v. *Arkansas-Missouri Power Co.*, (CCA 8, 1933) 65 F. (2d) 425, 428;

Hanley v. *Pacific Livestock Co.* (CCA 9, 1916) 234 Fed. 522;

Accumulator Co. v. *Consolidated Electric Storage Co.*, 53 Fed. 793, 796 (C. C. D. N. J., 1892);
General Electric Co. v. *McLaren*, 140 Fed. 876, 878 (C. C. D. N. J., 1905);
General Mfg. Corporation v. *Gray* (D. C. W. D. Okla., 1931) 48 F. (2d) 602, 604.

CONCLUSION.

Petitioners made a good faith effort to comply with this vague injunction. They thought they were complying. And they did comply. There was neither adequate pleading nor proof that they did not comply or that they *willfully* disobeyed this writ.

The judgments below are clearly contrary to decisions of this Honorable Court governing such criminal proceedings.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted.

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November 1949.